89-222

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SAMUEL JOE PIRAINO,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

(1) Whether a retroactive application of the Texas Court of Criminal Appeals' opinion in *Ex parte Beck*, 769 S.W.2d 525 (Tex. Cr. App. 1989), which substantially altered a notice requirement right, amounts to an *ex post facto* violation as it relates to petitioner, who had prevailed on his claim in the Court of Appeals?

(2) Whether the trial court's additional instruction over objection, viz, an *Allen* charge, facially coercive, and without an ameliorating admonition that no juror should yield his conscientious conviction, violated the Due Process Clause of the Fourteenth Amendment by denying petitioner a fair and impartial trial?

Petitioner submits that the Texas Court of Criminal Appeals has decided an important question of federal law which is in conflict with applicable decisions of this Court. Rule 17.1(c), Supreme Court Rules.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

OPINIONS BELOW

The opinion of the Court of Appeals, First Supreme Judicial District of Texas, sitting at Houston, Texas, reforming the judgment to delete the affirmative finding of a deadly weapon but otherwise affirming the conviction was unpublished. It is reprinted in the Appendix at A-4, together with the unpublished opinion of the Texas Court of Criminal Appeals reforming the judgment of the court of appeals that deleted the affirmative finding (A-2), and the refusal by the Texas Court of Criminal Appeals of petitioner's motion for rehearing (A-1).

JURISDICTION

The original opinion of the Texas court of appeals was issued on August 4, 1988. The state filed its first petition for review on or about September 15, 1988. Petitioner filed his petition for review and cross-petition on November 7, 1988. On May 3, 1989, the Texas Court of Criminal Appeals, in an unpublished opinion, reformed the judgment of the court of appeals that deleted the affirmative finding and reinstated the judgment of the trial court. On June 7, 1989, petitioner's motion for rehearing was denied with Clinton, Judge, dissenting.

This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves U.S.C. Const. Art. I, § 9, cl. 3; Art. I, § 10, cl. 1 and Amendment Fourteen.

STATEMENT OF THE CASE

Although charged with murder, petitioner was convicted on his plea of not guilty in the 209th District Court of Harris County, Texas, Honorable Michael T. McSpadden presiding, of the offense of involuntary manslaughter. Punishment was assessed by the jury at six (6) years confinement and a $5,000.00 fine. The jury also made a positive finding that a deadly weapon was involved which required that petitioner would not be eligible for release on parole until his actual calendar time served, without consideration of good conduct time, equaled one-third of the maximum sentence or twenty calendar years,

whichever is less. Texas Code of Criminal Procedure Art. 42.18, § 8(b).

On appeal the First Court of Appeals decided that petitioner was entitled to notice that the state would pursue an affirmative finding as authorized by Texas Code of Criminal Procedure, Art. 42.12, § 3g(a)(2), and a recent opinion of the Texas Court of Criminal Appeals. Accordingly, that court reformed the judgment and held, concomitantly, that the *Allen* charge was not coercive and therefore did not deny petitioner a fair and impartial trial.

The Texas Court of Criminal Appeals never responded to petitioner's claim that its unpublished opinion reforming the court of appeals' deletion of the affirmative finding was an *ex post facto* application of the decision in *Ex parte Beck*, 769 S.W.2d 525 (Tex. Cr. App. 1989) [decided March 22, 1989], which overruled the landmark decision on the subject matter (relied on by the court of appeals), *Ex parte Patterson*, 740 S.W.2d 766 (Tex. Cr. App. 1987); nor did it answer the complaint that the *Allen* charge was coercive on its face and otherwise.

On May 3, 1989, the Texas Court of Criminal Appeals summarily granted the state's petition for discretionary review, reformed the judgment of the court of appeals which deleted the affirmative finding, and reinstated the judgment of the trial court in that regard; concomitantly, the petitioner's application for discretionary review was refused. On June 7, 1989, the Texas Court of Criminal Appeals refused petitioner's motion for rehearing regarding the *ex post facto* and *Allen* charge complaints.

REASONS FOR GRANTING THE WRIT

Patterson was charged in a two paragraph indictment with the murder of another "by stabbing him with a knife," in the first paragraph, V.T.C.A. Penal Code, § 19.02(a)(1) and, in paragraph two, with "commit[ting] an act clearly dangerous to human life, namely stabbing him with a knife," and thereby causing his death, § 19.02(a)(2), supra. The indictment did not expressly allege the knife was a deadly weapon; nor is a knife a deadly weapon *per se*. *Hawkins v. State*, 605 S.W.2d 586 (Tex. Cr. App. 1980).

At the end of the guilt or innocence stage, a special issue was submitted to the jury regarding the deadliness of the weapon involved. The jury made a positive finding in that regard which required that one so sentenced would not be eligible for release on parole until his actual calendar time served, without consideration of good conduct time, equaled one-third of the maximum sentence or twenty calendar years, whichever is less. Art. 42.18, § 8(b), supra.

At *habeas* the Texas Court of Criminal Appeals concluded that *Patterson* was entitled to notice that the state would pursue an affirmative finding as authorized by Texas Code of Criminal Procedure, Art. 42.12, § 3g(a)(2). Accordingly, the judgment of the trial court was reformed to delete the recitation of the jury's answer to the special issue and the trial court's affirmative finding made thereon. Otherwise the judgment was not disturbed.

Petitioner was charged by indictment with murder. The indictment alleged, in pertinent part, that [he] "did then and there . . . intentionally and knowingly cause the death of [the complainant] . . . by shooting [him]

with a gun." Attached to the guilt or innocence instruction was a document requesting the jury to make a determination on the issue of use or exhibition of a deadly weapon. The issue was answered affirmatively. (T. 58). The indictment did not expressly claim the gun was a deadly weapon; nor is a gun a deadly weapon *per se*. *Smith v. State,* 721 S.W.2d 824 (Tex. Cr. App. 1986).

Two months after petitioner's sentence was imposed, the Texas Court of Criminal Appeals decided *Patterson,* supra, and held that an accused has a protectible liberty interest under Art. 1, § 19, Texas Constitution, to due course of law requiring notice of the state's intention to obtain an affirmative finding of use or exhibition of a deadly weapon under Art. 42.12, § 3g(a)(2), supra. That court went on to fully evaluate the Fourteenth Amendment liberty interest asserted by considering the applicability of *Morrissey v. Brewer,* 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972), *Wolff v. McDonnell,* 418 U.S. 539, 94 S. Ct. 2963, 41 L.Ed.2d 935 (1974), and *Meachum v. Fano,* 427 U.S. 215, 96 S. Ct. 2532, 49 L.Ed.2d 451 (1976), and other related opinions of this Court.

The indictments in *Patterson* and this case are functionally, intellectually, and legally the same. Why, then, was petitioner, who received a favorable ruling in the court of appeals premised on *Patterson,* not entitled to relief upon the same basis in the Texas Court of Criminal Appeals? It is because, *Suddenly Last March,* that court decided *Ex parte Beck,* supra, and held that "any allegation which avers a death *was caused* by a named weapon or instrument *necessarily includes* an allegation that the named weapon or instrument was, in the manner of its use . . . capable of causing (since it

did cause) death. It appears to the neutral eye that this treasureable analysis lay *undiscovered* during the writing of *Patterson* and its aftermath, even though, presumably, the Texas Court of Criminal Appeals had the tools to articulate the issue.

In *Beazell v. Ohio,* 269 U.S. 167, 169-170, 70 L.Ed. 216, 46 S. Ct. 68 (1925), Mr. Justice Stone summarized for the Court the characteristics for an *ex post facto* law.

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more *burdensome the punishment for the crime after its commission,* or which deprives one charged with [a] crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto.*

Accord, Miller v. Florida, 482 U.S. ____, 96 L.Ed.2d 351, 107 S. Ct. ____ (1987).

The practical effect of the decision of the Court of Criminal Appeals requires that petitioner serve one-third of his sentence, two years, before becoming eligible for parole. *All other prisoners* shall become eligible for release on parole when their calendar time plus good conduct time equals one-third of the maximum sentence imposed or twenty years, whichever is less. Art. 42.18, § 8(b), supra.

The reasoning in *Miller v. Florida,* supra, requires consideration of this issue.

On *his* application for discretionary review to the Texas Court of Criminal Appeals, petitioner claimed that:

> The court of appeals erred when it held that the additional instruction to the jury, viz, an *Allen* charge, was not facially coercive notwithstanding the absence of an ameliorating admonition that no juror shall yield his conscientious conviction.

The facts relative to this issue shows that on August 18, 1987, 10:10 a.m., the penalty phase of the trial began. (R. VIII. 5). The state's testimony encompassed 10 minutes. (T. 88). The petitioner used 64 minutes. (T. 88). After 28 minutes of argument the jury retired to deliberate. (T. 88). After four (4) hours of deliberation the jury was unable to reach a verdict and separated. Petitioner moved for a mistrial which was denied. (R. VIII. 94, T. 88).

The jury returned on August 19, 1987, 8:58 a.m., and deliberated until 11:52 a.m. Petitioner moved for a mistrial which was denied. (R. VIII. 98, T. 88).

The jury returned from lunch at 1:05 p.m. and began deliberations again. (T. 88). At 1:33 p.m. the court received a note from the foreperson stating "that the numerical split was 11-1, and the dissenter will not change his mind." (R. VIII. 101).

The court then gave the following instruction over specific objection:

> I am going to charge you an additional charge at this time, and you will have this charge to go back with you.
>
> Members of the jury, it would be necessary for the court to declare a mistrial in Cause No. 470951 if the jury finds itself unable to arrive at a unanimous verdict after a reasonable length of time. The in-

> dictment would still be pending and it is reasonable to assume that the case will be tried again with the same questions to be determined by another jury with no reason to hope that such other jury would find the questions any easier to decide. The length of time that the jury will be required to deliberate is within the discretion of the Court. The Court does not at present feel that the jury has deliberated a sufficient length of time to totally eliminate the possibility of its being able to arrive at a verdict.
>
> Members of the jury, I'm going to ask that you take this back with you and discuss this. Please feel free at any time to give us any further notes to the Court. You may go back and continue to deliberate. (R. VIII. 102-104).

The jury retired at 1:39 p.m. and reached a verdict in less than 10 minutes. (R. VIII. 105).

Under the facts herein the following cases call for reversal, *United States v. Rogers,* 289 F.2d 433 (4th Cir. 1961); *United States v. Mason,* 658 F.2d 1263 (9th Cir. 1981) [Opinion by now Associate Justice Kennedy]; *United States v. Moore,* 653 F.2d 384 (9th Cir. 1981); *United States v. Beattie,* 613 F.2d 762 (9th Cir. 1980); *Miracle v. United States,* 411 F.2d 544 (9th Cir. 1969); *Kawakita v. United States,* 190 F.2d 506, 527 (9th Cir. 1951), aff'd. 343 U.S. 717, 72 S. Ct. 950, 96 L.Ed. 1249 (1952).

In *Potter v. United States,* 691 F.2d 1275 (8th Cir. 1982), the court held that the language of the *Allen* instruction was so coercive as to require reversal of the conviction where the instruction omitted any reference to burden of proof, failed to state that the defendant was to be acquitted if there was a reasonable doubt

as to guilt, omitted a clear statement that majority, as well as minority, should re-examine their position, and omitted any caution as to effect of the charge.

CONCLUSION

For the foregoing reasons, petitioner Samuel Joe Piraino asks that his petition for certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner
Samuel Joe Piraino

CERTIFICATE OF SERVICE

I, Ken J. McLean, do hereby certify that a true and correct copy of the above and foregoing Petition for a Writ of Certiorari has been forwarded via United States mail, postage prepaid, on this the _____ day of August, 1989, to:

Honorable Jim Mattox
Attorney General for the State of Texas
P. O. Box 12548
Austin, Texas 78711

KEN J. MCLEAN

APPENDIX

Court of Criminal Appeals
P. O. Box 12308, Capital Station
Austin, Texas 78711

Mail To:

Ken J. McLean
1900 N. Loop West, Suite 500
Houston, TX 77018

Official Notice
Court of Criminal Appeals

June 7, 1989

COA#: 01-87-00699-CR

RE: Case No. 1150-88
STYLE: Piraino, Samuel Joe

On this day the Appellant's Motion for Rehearing was denied.

JUDGE CLINTON DISSENTS

Thomas Lowe, Clerk

Received June 9, 1989

A-2

NO. 1150-88

SAMUEL JOE PIRAINO, Appellant

v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review
from the First Court of Appeals
[HARRIS County]

OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

A jury convicted appellant of involuntary manslaughter and assesed punishment at confinement for six (6) years and a $5,000.00 fine. The court of appeals affirmed the conviction in an unpublished opinion. Piraino v. State, No. 01-87-00699-CR (Tex. App.—Houston [1st], delivered August 4, 1988).

The State contends that the court of appeals erred in deleting the affirmative finding contained in the judgment. The court of appepals deleted the affirmative finding, holding that appellant did not have sufficient notice of the State's intent to seek a deadly weapon finding under Ex Parte Patterson, 740 S.W.2d 766 (Tex. Cr. App. 1987).

Appellant was charged by indictment with murder. The indictment alleges, in pertinent part, that appellant "did then and there . . . intentionally and knowingly cause the death of [the complainant] . . . by shooting the Complainant with a gun." In Ex Parte Beck, 769 S.W.2d 525 (Tex. Cr. App. 1989) [delivered March 22,

1989], we held that "any allegation which avers a death *was caused* by a named weapon or instrument *necessarily includes* an allegation that the named weapon or instrument was, 'in the manner of its use . . . capable of causing' (since it *did* cause) death." (footnote omitted) (emphases in original). This allegation satisfies the constitutional guarantees dealt with in *Ex parte Patterson*, supra. Likewise, in the instant case, the allegation that appellant did *"cause the death"* by use of a named weapon, necessarily includes an allegation that the named weapon or instrument was, in the manner of its intended use, capable of causing death. Such allegation is sufficient to provide notice that the nature of the weapon alleged in the indictment is an issue to litigate in the trial.

We summarily grant the State's petition for discretionary review, reform the judgment of the court of appeals that deletes the affirmative finding, and reinstate the judgment of the trial court containing the affirmative finding.

PER CURIAM

Delivered May 3, 1989

En Banc

Do not publish

A-4

OPINION

In The
COURT OF APPEALS
For The First District of Texas

NO. 01-87-00699-CR

SAMUEL JOE PIRAINO, Appellant

v.

THE STATE OF TEXAS. Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 470,951

(Received August 5, 1988)

Appellant was indicted for murder. A jury found him guilty of the lesser included offense of involuntary manslaughter and also found that he had used a deadly weapon in the commission of the offense. The jury assessed his punishment at six years confinement.

Appellant does not challenge the sufficiency of the evidence. In four points of error, he contends that the trial court committed reversible error by (1) submitting a special issue on whether the gun was a deadly weapon;

(2) failing to give an instruction on whether the shooting was accidental, as opposed to voluntary; (3) giving a coercive "Allen Charge" to the jury; and (4) allowing the State to offer evidence of an extraneous offense.

About 2 a.m. on March 7, 1987, the deceased drove his pickup truck into the driveway of a restaurant on Richmond Avenue in Houston. As he tried to pull into the parking lot, he found a limousine blocking his way. He blew his horn twice, and appellant got out of the limousine and came back to his truck. Appellant called the deceased "a mother fucker" and pointed a small pistol, which discharged when the deceased's common law wife blocked it with her hand. Appellant then told the limousine driver to park the limousine in the parking lot, and the deceased and his wife also parked their truck in the lot. As the deceased and his wife walked through the parking lot toward the restaurant, appellant appeared and again confronted the deceased. The two men resumed their argument, and soon thereafter, a witness observed the two men scuffling. The witness testified that he heard one shot, and afterward saw the deceased bleeding from the lip. The argument continued, and appellant told the deceased he would shoot him if he, the deceased, did not back away. The witness then heard a second shot, and appellant ran away.

An assistant medical examiner testified that one bullet entered the deceased's mouth, damaging several teeth and the jaw. The other bullet entered the deceased's chest, piercing portions of the heart and lung and destroying the spinal cord. The medical examiner's opinion was that the deceased died from the gunshot wound to the chest.

Appellant testified in his own defense. He stated that he fired the first shot as a "warning shot" to calm the deceased down. He testified that he pulled his gun because he thought the deceased was going to take a weapon out of his glove compartment. He said that the deceased wrestled with him and was trying to take the gun, and that the pistol discharged while they struggled. He said that the third shot was intended to be a warning shot fired to the side of the deceased; but he also testified that he did not remember how the weapon fired. He admitted that his pistol had to be cocked before it could fire and that it took very little force to make the hammer fall.

In his first point of error, appellant contends that the trial court committed reversible error in submitting the issue to the jury of whether the gun was a deadly weapon. He asserts that he was not given sufficient notice by the indictment or otherwise that the State would pursue an affirmative finding as authorized by Tex. Code Crim. P. Ann. art. 42.12, sec. 3g(a)(2) (Vernon Supp. 1988).

The indictment reads as follows:

> [Appellant] did then and there unlawfully, intentionally and knowingly cause the death of BRETT JEFFERY GROSSMAN, hereafter styled the Complainant, by shooting the Complainant with a gun. It is further presented that in Harris County, Texas, SAMUEL JOE PIRAINO, hereafter styled the Defendant, heretofore on or about March 7, 1987, did then and there unlawfully intend to cause serious bodily injury to BRETT JEFFERY GROSSMAN, hereafter styled the Complainant, and did cause the death of the Complainant by intentionally and knowingly committing an act clearly dangerous to human life, namely, by shooting the Complainant with a gun.

A gun is not a deadly weapon per se. *Ex parte Brooks,* 722 S.W.2d 140, 142 (Tex. Crim. App. 1986). The Court of Criminal Appeals has held that an accused has a protectable liberty interest under article I, section 19 of the Texas Constitution, which requires notice of the State's intention to obtain an affirmative finding of the use or exhibition of a deadly weapon. *Ex parte Patterson,* 740 S.W.2d 766, 777 (Tex. Crim. App. 1987). There, the court held that the absence of notice deprived a defendant of a fair and impartial hearing on the issue, and that the error was fundamental and not subject to waiver by failure to object to the submission of the issue. *Id.* at 777. The error does not require reversal, however, and the judgment may be reformed to delete the jury's answer to the issue and the trial court's affirmative finding thereon. *Id.* at 778. This Court is bound by the holding of the Court of Criminal Appeals in *Patterson,* which requires deletion of the deadly weapon finding from the judgment even though the defendant failed to show either surprise or harm in the submission of the issue. *Luken v. State,* 744 S.W.2d 274 (Tex. App.—Houston [1st Dist.] 1987, pet. granted).

The State argues that *Patterson* is inapplicable to this cause because the indictment was filed after December 1, 1985, the effective date of the amendment to article 1.14(b) of the Code of Criminal Procedure, which provides:

> If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or

> in any other postconviction proceeding. Nothing in this article prohibits a trial court from requiring that an objection to an indictment or information be made at an earlier time in compliance with Artcile 28.01 of this code.

Tex. Code Crim. P. Ann. art. 1.14(b) (Vernon Supp. 1988).

Thus, the State asserts, because of the provisions of article 1.14(b), as amended, appellant's failure to object to the indictment waived any error regarding the submission of the issue.

The State's argument does not meet the point asserted by appellant. Appellant does not object to the form or substance of the indictment, but to the special issue being submitted to the jury without any prior notice. We conclude that *Patterson* controls, and we overrule the State's contention and sustain appellant's first point of error.

In his second point of error, appellant contends that the trial court committed reversible error in failing to give an instruction on involuntariness, that is, that the shooting was accidental as opposed to voluntary. Appellant is apparently contending that, of the two shots that struck the deceased, the first was a result of the struggle between the two men, and the second was not actually recalled by appellant. Thus, appellant argues, the shooting was an accident. Appellant relies on *Dockery v. State*, 542 S.W.2d 644 (Tex. Crim. App. 1975), which says that a homicide may still be accidental under our new penal code. The court said that "if a homicide is not the result of voluntary conduct, it cannot be criminally punished." *Id.* at 649.

Failure to grant a defendant's special request for charge on accident, when properly and timely presented, is reversible error. *Garcia v. State*, 605 S.W.2d 565 (Tex. Crim. App. 1980). But conduct is not rendered involuntary simply because an accused does not intend the result of his conduct. *Williams v. State*, 630 S.W.2d 640 (Tex. Crim. App. 1982). Where one voluntarily engages in conduct that includes a voluntary act and its accompanying mental state, the inclusion of an involuntary act does not necessarily render engaging in the conduct involuntary. *George v. State*, 681 S.W.2d 43, 45 (Tex. Crim. App. 1984). In *George*, appellant admitted that he drew a gun, pointed it at the complainant's face, and pulled the hammer back with his thumb. However, he claimed that the hammer slipped off his thumb and the gun went off. The court held that under such facts, as a matter of law, a jury need not be charged on whether the accused voluntarily engaged in the conduct with which he is charged. *Id.* at 47.

Similarly, under the facts of this case, the court properly refused appellant's requested instruction on accident. Appellant voluntarily followed Grossman to the parking lot, gun in hand, to continue the argument, and he voluntarily cocked the gun. That he may not now remember firing the gun does not render the act involuntary.

Appellant's second point of error is overruled.

In his third point of error, appellant contends that the trial court committed reversible error in giving an additional "Allen Charge" to the jury without an ameliorating admonition that no juror should yield his conscientious conviction.

The jury had deliberated four hours one afternoon and more than three additional hours the next morning

without reaching a verdict. A note from the foreman stated that the numerical split was eleven to one and that the dissenter would not change his mind. The court then gave the following instruction over appellant's objection:

> It would be necessary for the Court to declare a mistrial in Cause Number 470951 if the jury found itself unable to arrive at a unanimous verdict after a reasonable length of time; the indictment will still be pending and it is reasonable to assume the case will be tried again with the same questions to be determined by another jury and with no reason to hope such other jury would find the questions any easier to decide.
>
> The length of time the jury would be required to deliberate is within the discretion of the Court, and the Court does not at present feel the jury has deliberated a sufficient length of time to fully eliminate the possibility of its being able to arrive at a verdict.

After receiving this charge, the jury reached a verdict in less than 10 minutes.

Appellant concedes that the charge given was similar to the charge approved of in *Arrevalo v. State,* 489 S.W.2d 569 (Tex. Crim. App. 1973). However, appellant feels that the charge should have included the language in *Odom v. State,* 682 S.W.2d 445 (Tex. App. —Corpus Christi 1984, pet. ref'd), which said, "continue deliberations in an effort to arrive at a verdict that is acceptable to all members of the jury, if you can do so without doing violence to your conscience." *Id.* at 448. Appellant cites no authority to show that the added language in *Odom* is required. Error in an "Allen Charge"

only exists if the charge made jury misconduct likely. *Davis v. State,* 709 S.W.2d 288, 291 (Tex. App.—Corpus Christi, 1986, pet. ref'd). We do not find the charge as given to be coercive, and appellant does not point us to anything in the record to indicate that the charge made jury misconduct likely.

Appellant's third point of error is overruled.

In his fourth point of error, appellant contends that the trial court committed reversible error by allowing admission of an extraneous offense, namely, an assault against Edgar New.

During the State's rebuttal, New, a 40-year-old man who has had a few lessons in martial arts, testified that on the evening of October 10, 1986, he heard a loud, roaring car motor coming from a parking space under his condominium. He saw that the noise was coming from a limousine that someone was working on. He identified appellant as the person who was working on the limo. He went down to the parking area and asked appellant to stop the noise. New testified that appellant appeared to have been drinking. Appellant did not stop the noise, and New went back to his condo and called the police.

Before the police arrived, appellant stopped working on the car and went into one of the condo units. When the police arrived, New told them that appellant was in one of two units. The police knocked on both doors, but no one answered. The police left.

After the police were gone, appellant returned to the limo and resumed his work. New again went down to the parking area and, while standing in the shadows,

attempted to get the license number of the limo and the parking space number. Appellant saw New and went over to him to confront him. After speaking to him in an uncivil manner, appellant assaulted him with his fist and feet. New testified that he did nothing to provoke the assault. Appellant had something in his hand. New could not identify the object, but he said he could see the end of a dark cylinder. He thought it could have been the barrel of a small gun, because the rest of the object fit into appellant's hand, and appellant said to New, "Do you know what this is." New conceded on cross-examination that the object could have been a socket wrench.

New said that he was injured as a result of the assault, and photographs of his injuries were introduced into evidence. Under cross-examination, New admitted that the district attorney's office did not file charges against appellant for the assault. He also admitted that he had made a complaint about at least one other resident at the complex because of noise.

An extraneous offense may not be introduced into evidence unless, first, it is determined that the extraneous offense is relevant to a material issue in the case other than the defendant's character, and second, the probative value of the evidence outweighs its prejudicial effect. *Williams v. State,* 662 S.W.2d 344 (Tex. Crim. App. 1983). Two factors that reduce the prejudicial effect of the evidence are: (1) introduction of the evidence as a transaction rather than as a criminal offense, and (2) a proper instruction on the limited use of the extraneous offense. *Robinson v. State,* 701 S.W.2d 895, 899 (Tex. Crim. App. 1985); *Plante v. State,* 692 S.W.2d 487, 494 (Tex. Crim. App. 1985).

In this case, although the State, in its closing argument, made a reference to "extraneous offenses," the court's charge referred to a transaction. The charge reads as follows:

> The defendant is on trial solely on the charge contained in the indictment. The State has introduced in evidence a transaction other than the one charged in the indictment in this case, and with reference to that other transaction you are instructed that said evidence was admitted only for the purpose of determining the issue of self defense, if it does. You are further charged that if there is any evidence before you in this case tending to show that the defendant committed an act other than the offense alleged against him in the indictment, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other act, if it was committed and if you find and believe beyond a reasonable doubt from such testimony that the other act was committed, you may then consider the same in determining the purpose for which it was introduced and no other purpose.

In addition to the court's limiting instruction, appellant, on cross-examination, fully developed the fact that no criminal charges were filed as a result of the alleged assault. Thus, it is clear that the assault on New was admissible for the purpose of determining the issue of self-defense and that its prejudicial effect was limited by its introduction as a transaction and by the court's limiting instruction.

Appellant's fourth point of error is overruled.

The judgment of the trial court is reformed to delete the recitation of the jury's answer to the special issue and the trial court's affirmative finding of use of a deadly weapon. In all other respects, the judgment of the trial court is affirmed. The clerk of the trial court is ordered to inform the Texas Department of Corrections of the reformation of the judgment in cause number 470,951.

/s/ FRANK G. EVANS
Frank G. Evans
Chief Justice

Justices Bass and Dunn also sitting.

Do not publish. Tex. R. App. P. 90.

Judgment rendered and opinion delivered: August 4, 1988

True copy attest:

/s/ KATHRYN COX
Kathryn Cox
Clerk of Court